

FEDERAL RULE OF EVIDENCE 703 –

EXPERT TESTIMONY BASED ON INADMISSIBLE EVIDENCE

Generally, experts are still allowed to give their opinion even though the opinion is based on inadmissible evidence. *See West v. Bell Helicopter Textron, Inc.*, 967 F. Supp. 2d 479, 505 (D.N.H. 2013); *Bartlett v. Mut. Pharm. Co.*, No. 08-CV-358-JL, 2010 WL 3092649, at *1 (D.N.H. Aug. 2, 2010). Rule 703 permits an expert to testify to an opinion even if that opinion is based on otherwise inadmissible facts or data. *Williams v. Illinois*, 132 S. Ct. 2221, 2242, (2012). If the expert can show that other experts “reasonably rely” on this type of data, then the expert’s opinion testimony can be based on matters that have been or would be excluded under the other evidence rules. Rule 703 permits an expert to base opinion testimony on personal knowledge, evidence admitted at trial, or evidence not admitted so long as it supplies the kind of facts or data that experts in the field “reasonably rely” on in forming an opinion. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591 (1993) ; Fed. R. Evid. 703.

Disclosure of the inadmissible information to the jury is permitted if “the court determines that [its] probative value in assisting the jury to evaluate the expert's opinion substantially outweighs [its] prejudicial effect.” Fed.R.Evid. 703. An example of where an out-of-court statement might be admitted for a purpose other than to establish its substantive truth and not violate the hearsay rule, is when an expert witness testifies regarding the out-of-court development of facts or data on which the expert's opinions were based.

I. Under the Federal Rule of Evidence 703, the evidence underlying the expert testimony does not need not be admitted or even be admissible, provided it is the type reasonably relied upon by experts in the field.

The general rule, prior to the enactment of the Federal Rule of Evidence 703, was that the opinion evidence of an expert witness could be based upon facts within his or her own

knowledge or upon hypothetical questions embracing facts supported by the evidence, but could not be based upon the opinions or conclusion other witnesses. *See* Am. Jur. 2d, Expert and Opinion Evidence § 36 (2016). The purpose of Rule 703 is “to promote the efficiency by expanding the acceptable bases for expert testimony to include inadmissible evidence such as hearsay. Charles Alan Wright & Victor Gold, Federal Practice and Procedure § 6272 (2016). Rule 703 “governs the use, at trial, of otherwise inadmissible information that an expert witness has relied upon. . . in reaching his opinions.” *MMG Ins. Co. v. Samsung Elecs. Am., Inc.*, 293 F.R.D. 58, 65 (D.N.H. 2013). The Rule authorizes an expert to testify to an opinion she formed even if she based that opinion on otherwise inadmissible facts or data, which at times may include out-of-court testimonial statements. Fed. R. Evid. 703. Specifically, the rule states:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only *if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.*

Fed. R. Evid. 703. The 2000 advisory committee notes highlight the purpose of the balancing test and what happens when the policies behind FRE 703, permitting an expert to testify to opinions based on facts reasonably relied upon by experts in the particular field in forming opinions or inferences, come into conflict with an evidence exclusion, such as the hearsay exclusion, that excludes otherwise relevant evidence to promote public policy goals.

The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. *The amendment provides a presumption against disclosure to the jury of information*

used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert.

Fed.R.Evid. 703 advisory committee's notes (2000 Amendments) (emphasis added).¹

Based on the Rule and the advisory notes, the language used does not explicitly allow an expert to relay the expert's inadmissible basis to the jury. Thus, courts may allow the basis in evidence for the limited purpose of explaining the opinion of an expert, allow the basis in as substantive evidence; or allow opinions based on inadmissible evidence while forbidding any mention of the inadmissible part of the basis.² The Supreme Court outlined four safeguards to prevent inadmissible evidence from being presented to the jury:

First, trial courts can screen out experts who would act as conduits for hearsay by strictly enforcing the requirement that experts display genuine “scientific, technical, or other specialized knowledge” to help the trier of fact understand the evidence or determine a fact at issue. . . . Second, experts are generally precluded from disclosing inadmissible evidence to a jury. Third, if such evidence is disclosed, a trial judge may instruct the jury that the statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence establishing its underlying premises. Fourth, if the prosecution cannot muster independent admissible evidence to prove foundational facts, the expert's testimony cannot be given weight by the trier of fact.

Williams, 132 S. Ct. at 2225.

II. New Hampshire Federal District Court found that facts and data relied upon by experts need not be admissible in order for the expert's opinion to be admitted.

In *Bartlett v. Mut. Pharm. Co.*, the Defendant moved in *limine* to exclude various types of evidence; specifically, the Defendant seeks to exclude evidence of adverse drug event reports, arguing that such reports are hearsay. *Bartlett*, No. 08-CV-358-JL, 2010 WL 3092649, at *1. Judge Laplante found that the Plaintiff's experts may testify based on the adverse drug event

¹ Available at <http://federalevidence.com/node/1335#Rule703>.

² Paul R. Rice, *Proposed Revisions to the Federal Rules of Evidence, Standing Committee of Rules of Practice & Procedure Advisory Committee on Evidence Rules, Comments and Proposals* (Oct. 22, 1998); available at <https://www.wcl.american.edu/pub/journals/evidence/eproject6.pdf>

reports received by the Food & Drug Administration “if they are ‘reasonably relied upon by experts in the particular field,’ *notwithstanding any hearsay problems*. . . The reports themselves ‘need not be admissible in order for the [expert] opinion or inference to be admitted.’ *Id.* (emphasis added). Additionally Judge Laplante noted, “[t]hat does not mean, however, that Bartlett's experts may recite the contents of the reports or share copies with the jury.” No. 08-CV-358-JL, 2010 WL 3092649, at *1; *See also Town of Wolfeboro v. Wright-Pierce, Inc.*, No. 12-CV-130-JD, 2014 WL 1806843, at *2 (D.N.H. Apr. 2, 2014) (Judge Joseph A. DiClerico, Jr.) (noting an expert merely copying what another expert concluded into his own report “are not his opinions based on facts or data appropriately relied on in his field” and, thus, are not admissible).

The Defendant also sought to exclude evidence of an article arguing that it was hearsay and unreliable. *Id.* at 6. Judge Laplante, consistent with the above analysis, also found that the Plaintiff’s experts may testify based on the article, “*even if it is hearsay*, since such articles are “reasonably relied upon by experts in the particular field.” *Id.* at 7 (emphasis added). Judge Laplante did not describe what influenced his decision, but said “this court cannot make those determinations [referring to evidence that may constitute hearsay, but still may be a permissible basis for expert testimony] in the abstract, without reference to particular evidence. *Id.* at 6.

In *West v. Bell Helicopter Textron, Inc.*, a case that hinges on whether the Plaintiff properly or improperly de-iced a helicopter, the Plaintiff sought to prevent the Defendants' experts from testifying as to “what Paul Rice, who witnessed West's efforts to de-ice the helicopter, told those experts, as well as what Rice told FAA personnel who investigated West's crash” because the statements were hearsay. 967 F. Supp. at 505. Judge Laplante denied the Plaintiff’s motion because “an expert witness can base his opinion testimony on inadmissible evidence, provided that ‘experts in the particular field would reasonably rely on those kinds of

facts or data in forming an opinion on the subject,’ and ‘the proponent of the opinion *may disclose them to the jury*’ so long as ‘their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.’”³ *Id.*

Further, he stated that the Plaintiff “does not question that experts in aviation safety or accident reconstruction would reasonably rely on an eyewitness's accounts of how the aircraft involved in the accident was de-iced” and “the probative value of those accounts outweighs their prejudicial effect—particularly because, as the defendants indicate in their objection, they intend to call Rice as a witness at trial.” *See also Jenks v. New Hampshire Motor Speedway*, No. 09-CV-205-JD, 2012 WL 274348, at *4 (D.N.H. Jan. 31, 2012) (Judge Joseph A. DiClerico, Jr.) (finding that the hearsay evidence, as used in this case, meets the requirements of FRE 703 because “Dr. McKenzie testified that the NEISS database is used by experts in the field of product safety and injury and Textron offer[ed] no evidence to the contrary” and that “[e]ven if . . . the NEISS database information is inadmissible hearsay, that would not necessarily preclude Dr. McKenzie and Dr. McGwin from relying on the information in forming their opinions.”).

III. The First Circuit found that Rule 703 does not authorize admitting hearsay on the pretense that it is the basis for the expert’s opinion if the expert adds nothing to the out-of-court statements other than transmitting them to the jury.

Rule 703 gives the trial court power to exclude expert opinion under the “reasonably rely clause.” *See Almonte v. National Union Fire Ins. Co.*, 787 F.2d 763, 770 (1st Cir. 1986)(finding that the trial court erred in failing to conduct a more extensive investigation into whether the expert’s reliance on facts or data was reasonable); *see also Univ. of Rhode Island v. A.W.*

Chesterton Co., 2 F.3d 1200, 1218 (1st Cir. 1993) (Rules 703 and 705 do not afford automatic

³ *See also Roberts v. Tardif*, 417 A.2d 444, 450 (Me. 1980)(stating “Insofar as the 1967 x-ray report was used in the manner contemplated by Rules 703 and 705, primarily as the basis for opinion evidence by Dr. Cibley, there was no necessity for its authentication or admission in evidence. An important purpose of Rule 703 is to permit the expert to give his opinion on the basis of information from sources that are normally reliable, such as hospital records, without requiring formal presentation of those sources through the time-consuming process of authentication.”).

entitlements to proponents of expert testimony. Rule 703 requires the trial court to give “careful consideration” to any inadmissible facts upon which the expert will rely, in order to determine whether reliance is ‘reasonable.’ . . . While the trial court’s discretion is not unfettered, at a minimum the rules suggest that the proponent must be prepared, if the court so requires, to make a limited offer of proof to aid the court in its assessment.”); *Am. Universal Ins. Co. v. Falzone*, 644 F.2d 65, 66 (1st Cir. 1981) (instructing the jury that expert report was being admitted only to show the basis of the expert’s opinion and not for th truth of the report).

Similar to Judge Laplante and Judge DiClerico’s analyses, described above, the First Circuit found that experts may rely on “technical manuals, conversations with manufacturers, and [their] prior experience” in forming their opinions, but “the entirety of his or her testimony cannot be the mere repetition of the out-of-court statements of others.” *United States v. Luna*, 649 F.3d 91, 105 (1st Cir. 2011). *See also United States v. DeSimone*, 488 F.3d 561, 575 (1st Cir. 2007) (admitting into evidence a summary chart of Defendant’s receipt of payments and net profits, which was prepared by expert [IRS agent] and used to aid the expert in his testimony in a case where the Defendant filed a false tax return); *Adhesive Coating Co, Inc. v. Bolton Emerson Intern, Inc.*, 851 F.2d 540, 545 (1st Cir. 1988) (permitting accountant to base damages testimony on Plaintiff’s financial records and interviews with employees because these sources were “normally and reasonably relied upon by accountants.”). Further, the First Circuit noted that “experts are allowed to testify to their bare conclusions.” *Bezanson v. Fleet Bank-NH*, 29 F.3d 16, 22 (1st Cir. 1994).

Additionally, the First Circuit, quoting a case from the Second Circuit, stated that “a party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony.” *United States v. Kantengwa*,

781 F.3d 545, 561 (1st Cir. 2015) (quoting *Malletier v. Dooney & Bourke, Inc.*, 525 F.Supp.2d 558, 666 (S.D.N.Y.2007)). However, the First Circuit found that “a long tradition exists of allowing experts to rely on hearsay where it is common practice in the profession to rely upon such evidence.” *Nardi v. Pepe*, 662 F.3d 107, 112 (1st Cir. 2011). The court used an example of a “testifying doctor who relies in part on medical tests or specialist reports.” *Id.*

The First Circuit in *United States v. Corey* found that “[t]he rationale [of Rule 703 is that experts in the field can be presumed to know what evidence is sufficiently trustworthy and probative to merit reliance.” 207 F.3d 84, 89 (1st Cir. 2000). The court in this case found the expert’s testimony admissible even though the expert based his opinion partly on telephone conversations (hearsay evidence) because he also based his opinion on customary research and his own independent study. *Corey*, 207 F.3d at 89-91; *see also Trull v. Volkswagen of Am., Inc.*, 187 F.3d 88, 97 (1st Cir. 1999), certified question answered, 145 N.H. 259, 761 A.2d 477 (2000) (allowing the experts' testimony in an action against a van manufacturer by estate of a deceased passenger because the testimony was comprised of “data compilations of public agencies setting forth ‘matters observed pursuant to duty imposed by law as to which matters there was a duty to report’; testimony did not constitute inadmissible hearsay since it was based on data that was, under Rule 703, of a type reasonably relied upon by experts in the field); *United States v. Morrison*, 531 F.2d 1089, 1094–95 (1st Cir. 1976) (holding that under FRE 703 an FBI examiner could rely upon a report prepared by others of gambling slips and records originally analyzed and totaled in the FBI laboratory because the examiner had ascertained the validity of the computation by simple checks and had personally verified some of the information).

IV. In forming an opinion, based on the New Hampshire Rule of Evidence 703, an expert may rely on facts or data not admissible in evidence, assuming those facts are of a type reasonably relied upon by experts in that particular field.

Unlike FRE 703, the New Hampshire Rule of Evidence 703 does not include a balancing test of when facts or data can be disclosed to the jury. The rule states:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible in evidence.*

N.H. R. Evid. 703. The New Hampshire Supreme Court found “Rule 703, which permits expert reliance on otherwise inadmissible testimonial hearsay ... necessarily involve[s] a case-by-case assessment as to the quality and quantity of the expert's reliance.” *State v. McLeod*, 165 N.H. 42, 54 (2013). Further, the Court stated “experts may testify, on direct examination, that they relied upon witness statements, among other evidence, in reaching their conclusions.” *Id.* at 55. In another case, the Court noted that even though “the weight to be accorded to expert testimony is generally a determination for the trier of fact . . . the bases of expert testimony must be carefully considered and “the opinions expressed by any expert are only of value insofar as they are based upon factual assumptions which are fairly supported in the record.” *Bartlett Tree Experts Co. v. Johnson*, 129 N.H. 703, 707 (1987).

Similar to the New Hampshire District Court and the First Circuit, the New Hampshire Supreme Court stated that Rule 703 does not allow “an expert's testimony to simply parrot the corroborative opinions solicited from nontestifying colleagues.” See *State v. Connor*, 156 N.H. 544, 547-48 (2007) (finding that the expert’s testimony was inadmissible because the expert did not rely upon another’s verification as a basis for his opinion, but rather “it was simply a necessary prerequisite to the release of his already formed opinion.”). The Supreme Court also stated that “while an expert may rely upon inadmissible evidence to form an expert opinion, the basis for the conclusion is assumed to lie in his or her special knowledge of such matters.” See

Figlioli v. R.J. Moreau Companies, Inc., 151 N.H. 618, 624 -25 (2005) (finding that the expert’s testimony was merely an attempt to “circumvent the court’s ruling prohibiting Jamieson from testifying” because the expert’s reliance upon Jamieson’s report “was merely a repetition of findings that Jamieson had made, but was not permitted to disclose.”).

V. There is case law that supports and opposes expert testimony in summary judgment.

Courts permit expert witness participation in summary judgment.⁴ See *Marine Polymer Techs., Inc. v. HemCon, Inc.*, No. CIV. 06-CV-100-JD, 2009 WL 801826, at *1 (D.N.H. Mar. 24, 2009). However, there is still case law opposing expert testimony in summary judgment.⁵ The majority of the United States Supreme Court in *Sartor v. Arkansas Natural Gas Corp.*, a royalty dispute centered around the exact market price of natural gas, fully considered the expert affidavits submitted when deciding whether summary judgment should be granted. 321 U.S. 620-21 (1944).

Due to the lack of case law in the First Circuit we must turn to other persuasive authorities. The 9th Circuit found “Rule 56(e) requires that supporting and opposing affidavits be made on personal knowledge of the affiant, set forth facts that would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein.” *Doe v. Cutter Biological, Inc., a Div. of Miles Labs., Inc.*, 971 F.2d 375, 385 (9th Cir. 1992) (footnote 10) quoting *Scharf v. United States Attorney General*, 597 F.2d 1240, 1243 (9th Cir.1979).

⁴ E.g. *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 704–05 (7th Cir.2008); *United States v. Dailide*, 227 F.3d 385, 392 (6th Cir.2000); *Doe v. Cutter Biological, Inc.*, 971 F.2d 375, 385–86 n. 10 (9th Cir.1992); *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1423 & n. 15 (3d Cir.1991).

⁵ Edward Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment*, 22 U.C. Davis L. Rev. 93 1988-1989.

Further the court stated that “Rule 56(e)'s ‘personal knowledge’ requirement does not negate an expert witness' right under F.R.Evid. 703 to base her or his opinion on data “made known to the expert,” which “need not be admissible in evidence.” *Doe*, 971 F.2d at 385 (footnote 10).

There is a lack of case law in New Hampshire opining as to whether an expert’s testimony should be allowed during summary judgment when the testimony relies on inadmissible evidence. However, Judge DiClerico stated in *Marine Polymer Techs.*, an expert’s opinion is not “excluded per se from consideration for purposes of summary judgment.” *Marine Polymer Techs., Inc.*, No. CIV. 06-CV-100-JD, 2009 WL 801826, at *1. Rather, an expert’s opinion “in the form of affidavits and declarations that satisfy the [summary judgment standard]are competent evidence to be considered for purposes of summary judgment. *Id.* In *Marine Polymer Techs.*, the Defendant move to strike the expert’s declarations “on the grounds that they are not based on [expert’s] personal knowledge, as required by Federal Rule of Civil Procedure 56(e), that the opinions are not reliable, and that the opinions offer impermissible legal conclusions.” *Id.*

The court stated that “[i]n the context of an affidavit offering the opinion of an expert witness submitted in support of or in opposition to a motion for summary judgment, the expert's opinions, stated in an affidavit, are subject to Rule 56(e) and Federal Rules of Evidence governing expert testimony.” *Id.* Further, the court noted that, under Rule 703, an “expert witnesses can present opinions in affidavits, submitted in support of or in opposition to summary judgment, that are not based on their personal knowledge” if the expert provides “an affidavit with an opinion formed within his area of expertise and based on his own assessment or analysis of the underlying facts or data satisfies the personal knowledge requirement of Rule 56(e).” *Id.* Even though the Defendant contended that the expert’s opinions were not based on personal

knowledge because he relied on test results and statements produced by [Defendant], the court found that “[p]ersonal perception is [] not necessary as the basis for an expert's opinion affidavit submitted for purposes of summary judgment.” *Id.* at 2.